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Supreme Court, U.S.
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No. 95-1114

In the Supreme Court of the United States

OCTOBER TERM, 1995

J.S.G. BOGGS, PETITIONER

v.

ELJAY BOWRON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 474 and 18 U.S.C. 504, which restrict the possession or production of illustrations of United States currency and other obligations and securities of the United States, violate the First Amendment.

2. Whether 18 U.S.C. 474 and 18 U.S.C. 504 could be applied to petitioner, who contends that he does not knowingly act to defraud.

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OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 67 F.3d 972 (Table). The opinion of the district court (Pet. App. 4a-46a) is reported at 842 F. Supp. 542.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1995. The petition for a writ of certiorari was filed on January 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution expressly gives Congress the power to "coin Money [and] regulate the Value thereof," Art. I, § 8, Cl. 5, and to "provide for the Punishment of counterfeiting the Securities and currency Coin of the United States," Art. I, § 8, Cl. 6. Pursuant to that authority, Congress enacted the statutes at issue in this case. The fifth and sixth paragraphs of 18 U.S.C. 474 prohibit possessing or producing the likeness of an obligation or security of the United States.[1] Another statute, 18 U.S.C. 504, creates exceptions to that prohibition. Section 504(1) permits the possession or production of illustrations of United States obligations and securities if the illustration is in black and white and less than 75% or more than 150% the size of the original, and if the

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[1] Paragraphs 5 and 6 of 18 U.S.C. 474 provide:

> [5] Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> [6] Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—
>
> Is guilty of a class C Felony.

negatives and plates used in making the illustrations are destroyed after their final use.[2] This Court has ruled that those statutes, read in tandem, do not violate the First Amendment. *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984).

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[2] Section 504 (18 U.S.C.) provides:

> Notwithstanding any other provision of this chapter, the following are permitted:
>
> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,
>
> (C) any other obligation or other security of the United States, and
>
> (D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation.
>
> Illustrations permitted by the foregoing provision of this section shall be made in accordance with the following conditions —
>
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps * * * may be in color;
>
> (ii) all illustrations * * * shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps * * * may be in the exact linear dimension in which the stamps were issued; and
>
> (iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.
>
> The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary determines may be appropriate for such purposes.

2. Petitioner is an artist and an academic. He concedes that "much of [his] work is in the 'image of money.'" Pet. App. 5a. He reproduces in color the currency of the United States. These reproductions are often "actual-sized, *trompe l'oeil* pieces." *Id.* at 6a. As such, they are intended to be mistaken by the viewer, at least momentarily, for actual currency. See *id.* at 6a n.7 (noting that *trompe l'oeil* means "fool the eye"). The district court found that "many of [petitioner's reproductions] could be passed as genuine." *Id.* at 43a.

Petitioner not only reproduces federal currency, but his reproductions (so-called "Boggs Bills") are used by him as "a medium of barter." Pet. 4. Petitioner purchases services or goods with the reproductions, in order to "elict a dialogue about the meaning and use of art and money." *Ibid.* As the district court found, "[a]fter explaining to merchants that he is an artist, Mr. Boggs then barters these pieces, offering to exchange his art for the face value of the reproduction in goods and services." Pet. App. 6a.

3. The Secret Service is charged with enforcing the laws of the United States enacted to deter and punish the counterfeiting of United States currency. Petitioner has been the subject of Secret Service scrutiny for years. In September, 1990, the Secret Service became aware that a catalog of petitioner's work would contain images that violated the counterfeiting statutes; the publisher was informed, and the catalog was not published. In March, 1991, the Secret Service office in Cheyenne, Wyoming, became aware that petitioner was going to use his reproductions to obtain merchandise from a local store; an agent and the U.S. Attorney for that district visited

petitioner and seized as contraband some samples supplied by petitioner. Pet. App. 7a-8a.

In September, 1992, petitioner appeared for an interview in Pittsburgh, Pennsylvania, with Secret Service agents and was informed of the statutory guidelines for reproducing U.S. currency. Later that year, after Secret Service agents seized several items of petitioner's work from his residence, studio, and office, pursuant to a duly executed search warrant, petitioner was informed that his reproductions were in violation of the counterfeiting statutes and that he was subject to prosecution. In early 1993, petitioner was again informed by letter that his continued reproduction and passing of Boggs Bills could subject him to prosecution. In May, 1993, petitioner sought permission of the Secretary of the Treasury pursuant to 18 U.S.C. 504 for permission to continue making and distributing his reproductions, but such permission was denied on September 2, 1993. Pet. App. 8a-9a.

4. On September 3, 1993, petitioner brought this lawsuit for declaratory and injunctive relief. He sought a declaration that the anti-counterfeiting statutes (18 U.S.C. 474 and 504) either do not apply to him, because he had no intent to defraud, or are unconstitutional, C.A. App. A19; an injunction prohibiting the government from prosecuting him under the counterfeiting laws or interfering with his work or possessions and requiring the government to return all property that had been seized, *id.* at A18-A19; and an award of compensatory damages for interference with and injury to his property, *id.* at A20.

5. The district court determined that petitioner had a well-founded fear of prosecution and that the claim was therefore ripe for adjudication under the

Declaratory Judgment Act. Pet. App. 10a-16a. The court then held that the statutes at issue were constitutional and did not require proof of intent to defraud. *Id.* at 19a-41a. The court entered a final judgment dismissing petitioner's claim for an injunction prohibiting the government from prosecuting him. *Id.* at 49a-50a. The court retained jurisdiction over petitioner's claim for return of property and for compensation, pending the final appellate disposition of petitioner's claim for an injunction. *Id.* at 50a.

In its opinion, the district court noted that the publishing of illustrations of United States currency falls within the protection of the First Amendment. Pet. App. 19a-20a. Analyzing Sections 474 and 504 in tandem, see *Regan* v. *Time, Inc.*, 468 U.S. at 647-648, the district court found the size and color restrictions of Section 504 to be reasonable time, place, and manner limitations that can be constitutionally imposed on those wishing to create illustrations of currency. The court observed that those statutory provisions serve a significant governmental interest, leave open adequate alternative channels for communication of information, and are not based on the content or subject matter of speech. Pet. App. 23a-33a.

The district court also rejected petitioner's claim that paragraphs five and six of Section 474 are not applicable to his activities because those paragraphs require an intent to defraud or an intent to pass as genuine and he did not have such an intent when he possessed or produced his "Boggs Bills." Pet. App. 33a-41a. The court additionally rejected petitioner's claim that his illustrations are not in the likeness or similitude of genuine United States currency. *Id.* at 41a-43a.

6. In an unpublished judgment order, the court of appeals affirmed, substantially for the reasons set forth by the district court. Pet. App. 1a-3a. The court specifically rejected petitioner's contention that "convictions under the fifth and sixth paragraphs of § 474 require proof of fraudulent intent." Pet. App. 2a. The court also rejected petitioner's contention that a jury could not find that his bills bore a "similitude" or "likeness" to United States currency, as required by the fifth and sixth paragraphs of Section 474, respectively. The court noted that petitioner sought a blanket "declaration that the statute does not apply to his work generally and an injunction that would protect him from prosecution for works in the same genre that he might produce in the future, or has already produced but not submitted for review." Pet. App. 2a. The court held that, even if it were convinced that the sample of work it reviewed would not violate the statute, it could not, based only on such a sample, "give him the relief he has requested," *ibid.*, and that petitioner had failed to ask for any narrower ruling.

ARGUMENT

The courts below correctly applied the holding of this Court in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), that the challenged provisions of Sections 474 and 504 are constitutional. Its decision does not conflict with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *Regan*, this Court rejected the principal argument made by the petitioner. In that case, eight Members of the Court concluded that now-repealed provisions of Section 504 that hinged the legality of a reproduction of currency on the purpose to which the reproduction was to be put were content-based

restrictions that violated the First Amendment. 468 U.S. at 659 & n.14. A majority of the Court also concluded, however, that the size and color restrictions of Sections 474 and 504 were constitutional. See 468 U.S. at 659. Writing for a plurality, Justice White found that those restrictions are "reasonable manner regulations," *id.* at 658, that "do not discriminate on the basis of content." *Id.* at 656. The plurality also recognized that the size and color requirements "effectively serve the Government's concededly compelling interest in preventing counterfeiting." *Ibid.* In a separate opinion, Justice Stevens discussed those same size and color limitations and agreed that they were constitutional. See *id.* at 700-704.[3]

2. Petitioner appears to argue that this Court's decision in *Regan* is not applicable because "Time's complaint has little to do with that of [petitioner], who asserts his own rights as an artist to create obviously non-deceptive likenesses of the currency not falling within the narrow safe harbor." Pet. 15 n.12. The record in this case, however, does not establish that petitioner was creating "obviously non-deceptive likenesses of the currency." Instead, the district court noted that "many of the Boggs Bills could be passed as genuine." Pet. App. 43a. Petitioner's own description of them as "*trompe l'oeil* pieces," C.A. App. A12, confirms that description. Petitioner sought "broad

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[3] The four remaining Justices in *Regan* did not quarrel with the conclusion that the color and size limitations were constitutional. They disagreed with the Court's judgment on the basis of their conclusion that the (now-repealed) unconstitutional purpose requirement was not severable from the balance of the statute. See 468 U.S. at 661-691 (Brennan, J., concurring in part and dissenting in part); *id.* at 691-692 (Powell, J., concurring in part and dissenting in part).

declaratory and injunctive relief," rather than a declaration regarding specific samples of his work. See Pet. App. 2a-3a. Accordingly, even if some of his work could not be mistaken for genuine, the fact that some of his work could be so mistaken would preclude the declaration and injunction he seeks.

In any event, this Court's conclusions in *Regan* are fully applicable to petitioner, regardless of whether specific works he produces could be passed as genuine. As explained above, the Court in *Regan* rejected a magazine publisher's challenge to the size and color restrictions on the ground that those restrictions were not content-based and that they were reasonable restrictions on the "manner" of communication in light of the government's substantial interest in preventing counterfeiting. Those justifications are equally applicable to the same restrictions as applied to petitioner.

Petitioner also argues that this Court's decision in *Regan* is inapplicable because of "changes in technology," Pet. 16, that allegedly render the size and color restrictions ineffective. In support of that contention, petitioner cites congressional testimony indicating that other measures may be more effective against counterfeiters armed with the latest high-tech gear. That fact, however, does not support petitioner's argument. Even if the size and color restrictions do not protect against counterfeiters who use the latest high-tech equipment, those restrictions may still deter many potential counterfeiters who have no access to such equipment or who lack the expertise to operate it. Moreover, regardless of whether counterfeit currency can be manufactured with high-tech equipment, the size and color restrictions continue to "ensur[e] that the [Boggs bills]

themselves do not have the capacity to deceive the unwary and inattentive." *Regan*, 468 U.S. at 658 (plurality opinion). Nothing that has occurred since this Court's decision in *Regan* suggests that the size and color restrictions do not continue to serve an important purpose in protecting the integrity of United States currency.

3. Petitioner also claims that his activities do not fall within the purview of Sections 474 and 504 because the possession and production offenses created by those statutes require a showing of intent to defraud. The courts below correctly rejected that claim.

a. The possession offense, codified as the fifth paragraph of Section 474, specifies the intent applicable to the offense; the offender must have an "intent to sell or otherwise use" the illustration. 18 U.S.C. 474. The district court correctly held that, in light of Congress's express specification of the intent applicable to the offense, it would be inappropriate for a court to read a further "intent to defraud" element into the statute.

The production offense, codified as the sixth paragraph of Section 474, does not contain an express intent requirement. The district court, however, correctly held that the statute's place in a carefully articulated scheme prohibiting a variety of counterfeiting offenses leads to the inference that "Congress intended some crimes to carry an intent to defraud requirement and others not, as evidenced by the differences in classification and punishment set out in the statute." Pet. App. 40a (footnote omitted). Contrary to petitioner's suggestion (Pet. 12-13), the statute does not thereby create a "strict-liability felony." As the district court explained, "the proper

standard of intent for a violation under paragraph six of section 474 is 'knowing.'" Pet. App. 41a n.40. Neither *Morrissette* v. *United States*, 342 U.S. 246 (1952), nor any other case cited by petitioner suggests that a stronger intent requirement should be read into the statute here. Cf. *Staples* v. *United States*, 114 S. Ct. 1793, 1804 (1994) (holding that federal firearms offense that contains no specification of intent requirement requires proof that "[defendant] knew of the features of his [gun] that brought it within the scope of the Act").

b. The holding of the court below that an intent to defraud is not required for conviction under the fifth and sixth paragraphs of Section 474 does not conflict with the decision of any other court of appeals. Petitioner's contention to the contrary (Pet. 19) is mistaken.[4]

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[4] Petitioner states that the courts below "followed cases stating that section 474 is a strict-liability felony, even though the Government conceded that those cases were in error." Pet. 19 (footnote omitted). Our alleged "concession" consisted in our argument that the fifth paragraph of Section 474 requires an "intent to sell or otherwise use" and that the sixth paragraph of Section 474 requires a "knowing[]" state of mind. See, *e.g.*, Gov't C.A. Br. 37-38. The courts below agreed with us on those points, as did the courts of appeals cited by petitioner that are alleged to have "stat[ed] that section 474 is a strict liability felony." See *United States* v. *Green*, 962 F.2d 938, 942-943 (9th Cir. 1992) (upholding jury instruction that paragraph six of Section 474 requires knowledge, but not willfulness); *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954) (holding in prosecution under paragraph six of Section 474 that "there is no need of proof that [the] impressions were calculated to deceive," but not discussing whether knowledge was required).

Petitioner cites (Pet. 19 n.20) *United States* v. *Parr*, 716 F.2d 796, 808 (11th Cir. 1983), which involved the possession offense defined in the fifth paragraph of Section 474. As petitioner notes, the Eleventh Circuit in that case stated that the defendant "intended to *use* the note to induce [an undercover agent] to purchase large quantities of [counterfeit] notes," and that "[s]uch intent to use for unlawful purposes clearly falls within the scope of 18 U.S.C. § 474." 716 F.2d at 808. That statement does not imply, however, that such an intent is required in each case. Indeed, the Eleventh Circuit specifically rejected an argument identical to petitioner's, stating that it "disagree[d] with [defendant in that case] that the intent standard of § 474 necessarily implies an intent to defraud or an intent to pass as genuine," because "Congress explicitly stated that an 'intent to sell or *otherwise use*' is the requirement." *Ibid.* The Eleventh Circuit's decision in *Parr* is thus in accord with the decision of the courts below.

Nor does the decision below conflict with the Fifth Circuit's decision in *Britt* v. *United States*, 391 F.2d 540 (1968). See Pet. 19 n.20. In *Britt*, the court of appeals merely stated that there was "ample evidence * * * from which the jury was entitled to conclude * * * that [the defendant] had the requisite criminal intent" to commit the offense defined in the predecessor to the sixth paragraph of Section 474. 391 F.2d at 542. The Fifth Circuit did not state or imply that it believed that that intent was anything other than the "knowing" state of mind required by the courts in this case.

Finally, the decision in this case does not conflict with the Eighth Circuit's decision in *Michener* v. *United States*, 157 F.2d 616, rev'd on other grounds,

331 U.S. 789 (1947). See Pet. 19 n.20. In that case, the defendant was not convicted under either the fifth or sixth paragraphs of Section 474, but instead under a statute that criminalized the possession of a plate or stone in the likeness of United States currency "with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting." 157 F.2d at 618. The statutory provisions at issue here contain no similar language, and there is no reason why the intent requirement applicable to the offense in *Michener* should be read into the different provision at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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